No. 02-1028

MAY 2 3 2003

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED d/b/a KIRBY ENGINEERING and ALLIANZ AUSTRALIA LIMITED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS, THE LONDON JOINT CARGO COMMITTEE AND THE INSURANCE COUNCIL OF AUSTRALIA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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The American Institute of Marine Underwriters ("AIMU"), the London Joint Cargo Committee ("JCC") and the Insurance Council of Australia ("ICA") (referred to herein collectively as "Underwriters") respectfully submit this brief as *amici curiae* in support of Respondents.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

AIMU, a non-profit association, represents 44 United States insurance companies which underwrite about 90 percent of the marine risks insured in this country. In 2003, AIMU's members underwrote marine insurance policies with collective premiums of more than $1.8 billion. The insured value of the goods and vessels insured under these policies totaled hundreds of billions of dollars. More than a third of those premiums and insured values were for cargo shipped in United States foreign trade, including through multimodal shipments such as the one involved in this case.

The JCC represents the interests of both Lloyd's syndicates[2] and major insurance companies[3] which write

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1. Pursuant to Rule 37.2 (a), letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no person or entity other than *amici curiae* has made a monetary contribution to the preparation of this brief, and no counsel for a party has written this brief in whole or in part.

2. Lloyd's of London is a leading insurance market providing specialist insurance services to businesses in more than 189 countries. In 2004, 66 syndicates are underwriting insurance at Lloyd's.

3. These companies are also represented by the International Underwriting Association of London, which is the world's largest representative organization for international and wholesale insurance companies.

international cargo business from within the United Kingdom. Members of the JCC include senior cargo underwriters from the Lloyd's insurance market and from insurance companies based in London, through the International Underwriting Association ("IUA"). The JCC also includes representation from the UK Company market operating outside London.

Although it is difficult to identify accurately the level of involvement of JCC members and those it represents in terms of international insurance transactions, the JCC is widely recognized globally as a highly influential, authoritative body in the field of goods in transit insurance. The JCC produces model clauses for use by cargo insurers in London and internationally; it also monitors developments in the shipping and transport industry that may impact the underwriting of this class of business. JCC acts as a focal point for the discussion of relevant issues with other overseas insurance markets, insurance brokers and client bodies. In 2002 (the most recent year for which collective data is available), Lloyd's underwriters and IUA companies underwrote marine insurance policies with collective premiums of just over $2 billion. (This does not include the UK company market operating outside London.) More than 20% of that amount represented insurance of goods in transit.

The ICA is the representative body of the general insurance industry in Australia. ICA's 61 members account for more than 90 percent of total premium income written by private sector general insurers in Australia. Recently published statistics from the Australian Prudential Regulation Authority show that the private sector insurance industry in Australia, which employs about 25,000 people, generates direct premium revenue of approximately $20 billion

annually. ICA members issue roughly 38 million insurance policies and deal with 3.5 million claims each year. Marine insurance policies underwritten by ICA members account for approximately $189 million in premiums, of which approximately $110 million relates to transport and cargo insurance.

AIMU, on behalf of its members, works in cooperation with the United States government and international bodies to improve the legal environment for this business. The JCC works similarly in the United Kingdom and internationally as does the ICA in Australia through its Marine Standing Committee. (For example, the ICA was involved in amendments to the cargo liability regime set forth in the Australian Carriage of Goods Act in 1997.)

AIMU has consistently been involved in the establishment and development of the cargo liability regime in the United States. That involvement extends from AIMU's participation in shaping the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, in the 1920's and 1930's to the efforts in the United States to reform COGSA in the 1990's and to the current United Nations Commission on International Trade Law ("UNCITRAL") project to establish an international cargo liability regime. AIMU also has provided its views on these issues to courts, including through the filing of an amicus brief with this Court in *Robert C. Herd & Co., Inc. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), a case that for almost half a century has provided the doctrinal foundation in this country on the enforceability of Himalaya clauses.

This brief focuses on the second question presented in the petition for a writ of certiorari.[4] To the marine insurance industry, the proper scope of Himalaya clauses in multimodal carriage is of critical importance. It determines the extent to which insurers can recover, through subrogation actions, for losses suffered by their insureds. The adoption of Petitioner's position would establish, in effect, a system allowing any performing party in a multimodal carriage — no matter how far inland or attenuated to maritime activity — to invoke the considerably lower sea carriage liability limits whenever that party negligently damages goods. For that reason, *amici* have a substantial interest in the proper resolution by this Court of this appeal.

SUMMARY OF ARGUMENT

This case involves admiralty law, Himalaya clauses and the apportionment of liability for loss in international, multimodal cargo transport. *Amici* view the commercial issues here presented as being justly settled since this Court last entered this area 45 years ago. *Amici's* point of view is that there is no sound reason for changing established law, as Petitioner proposes.

First, the common law principles of contract construction that have long provided the basis of judicial interpretations

4. Question 2 is as follows:

> Whether federal maritime law requires that terms of a bill of lading extending liability limitations under [COGSA], to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

of Himalaya clauses have not lost their currency. Exculpatory clauses in form contracts of adhesion are to be clearly stated, and narrowly construed against the drafter. Any intention to extend to third parties benefits that are granted to the contracting parties must likewise be clearly expressed, and must indicate a well-defined class of readily identifiable persons to whom the benefits are extended. Lacking such clearly expressed coverage, those who are not signatories to the contract may not avail themselves of others' exculpatory provisions. Petitioner's position gives vague words that are routinely included in Himalaya clauses the broadest possible meaning, even though much more precise language can be, and often is, included when the carrier intends to benefit inland carriers.

Second, Petitioner's position is commercially unreasonable and unwise. Petitioner demonstrably never relied on the coverage it now asserts, and thus would receive a windfall if its position is adopted. Curtailing the ability of marine cargo insurers to recover damages from negligent inland carriers, as Petitioner urges the Court to do, would result in a drastic reapportionment of liability concepts within the shipping industry, for no apparent purpose. Shippers' insurance premiums will necessarily rise. *Amici* believe that existing legal rules of risk-sharing reflect a sensible, fair balance, constantly being fine-tuned by national and international regulatory bodies and the admiralty bar. It denies a contractual free ride to negligent non-parties, who of course can obtain their own insurance. There is simply no showing of any good reason, in law or equity, for this Court to step into a nonexistent breach.

ARGUMENT

I. The Decision Below Upholds Properly Settled Expectations And Contract Rights

The ruling below is in accord with the unanimous holdings of every court of appeals decision to address whether a Himalaya clause in a maritime bill of lading affords protection to an inland carrier. *See* Pet. App. 15a; *Caterpillar Overseas, S.A. v. Marine Transp., Inc.* 900 F.2d 714, 725-26 (4th Cir. 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (3d Cir. 1974). Adherence to that well-settled precedent contributes to the consistency and clarity that Underwriters seek regarding legal rules in their area of operations. Clear, dependable rules better enable Underwriters to provide efficient, fairly priced service to the shipping industry. In pricing their policies, Underwriters rely on their refined ability to project, based on precedent, how much they may recover from responsible third parties for many types of losses. This process benefits the insured too because the projection of recoveries from responsible third parties leads to reduced premiums.

Recovery actions keep premiums low in two ways. They enable insurers to hold down their premiums by reducing the insurers' net payments on claims. The fact that such actions can be brought provides an incentive for responsible parties to avoid negligence, thus reducing losses and further contributing to insurers' ability to maintain premiums at affordable levels.

These anticipated recoveries include the one sought here from Petitioner. In thousands of insurance policies currently in force, the insurers underwrote (and priced) risks based on

the expectation that they would be able to make recoveries from responsible third parties. These well-founded expectations will be pointlessly dashed if the Court adopts Petitioner's arguments, abandons longstanding precedent that has created certainty for insuring carriage of goods, and allows every party involved in a multimodal shipment to limit its liability, regardless of its relationship with, or identification to, the shipper.

II. The Contract At Issue In This Case Was Properly Enforced By The Court Below

This case involves a contract of carriage between an owner of cargo in Australia (Kirby) and a freight forwarder named ICC. ICC, acting as a non-vessel operating carrier ("NVOC"), issued the bill of lading to the shipper Kirby. This bill of lading is the only contract in this case to which Kirby was a party and it evidences the contract of carriage entered into between Kirby and ICC.

This contract purported to extend the benefit of ICC's liability limit, via a Himalaya clause, to "any servant, agent or other person including any independent contractors whose services have been used to perform the contract." Underwriters agree with the court below that Petitioner was outside the scope of this Himalaya clause and that Petitioner may therefore not limit its liability based on the ICC-Kirby bill of lading.

There are two reasons for this. First, because Petitioner was not in privity of contract with ICC, the Himalaya clause in the ICC-Kirby bill of lading does not apply to limit Petitioner's liability to Kirby. Second, the Himalaya clause in the ICC-Kirby bill of lading did not specify clearly enough

that the liability limit applicable to ICC would be extended to a subsequent inland carrier such as Petitioner. These requirements of privity and specificity are and should remain matters of settled commercial jurisprudence. In deciding the Himalaya clause issue on both grounds — each of which constitutes an independent holding — the Eleventh Circuit adhered to the great weight of circuit precedent in denying inland carriers the benefits of a vaguely worded Himalaya clause in a bill of lading issued by a carrier with whom it is not in privity of contract.

A. Himalaya Clauses Must Be Strictly Construed, as the Court Below Properly Did

Contracts that purport to curtail liability are, under familiar principles, to be narrowly construed. Professor Williston's treatise provides the basic rule:

> Exculpatory clauses generally fall within the rule that since they are not favored, they are strictly construed. . . . In addition to construing even the most clear and unambiguous exculpatory provisions strictly against the party seeking the benefit of the clause, the courts will often inquire as well into whether the liability at issue was unambiguously disclaimed in the first instance.

11 S. WILLISTON & R. A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:20 (4th ed. 1999) (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955)). In *Herd*, this Court stated that,

> . . . contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."[5]

Thus, the Himalaya clause in the ICC-Kirby bill of lading was properly interpreted narrowly by the court below.

Bills of lading are also subject to general principles of contract construction. *EF Operating Corp. v. American Buildings*, 933 F.3d 1046, 1050 (3d Cir. 1993). As a contract of adhesion, the bill of lading is strictly construed against the carrier.[6] *Id.*; *Mitsui & Co. v. American Exp. Lines, Inc.*, 636 F.2d 807, 822-823 (2d Cir. 1981) (Friendly, J.). This same concern applies with even greater force when a limitation of liability clause is being invoked by a carrier that is not even a party to the bill of lading or a subcontractor of the bill's issuer.

It has followed that any "intent to extend COGSA benefits to third parties must be clearly expressed." *Taisho*

5. 359 U.S. at 305 (quoting *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

6. Petitioner argues that the rule of strict construction only applies when there is an ambiguous limitations clause. Pet. Br. at 42. That proposition does not help Petitioner, however. The ICC Himalaya clause clearly does not extend by its own terms to inland carriers, by contrast with the more explicitly worded ocean carrier's bill of lading. To the extent there is any ambiguity in understanding the relational terms "servant, agent, or other person including independent contractor," that ambiguity must be construed against Petitioner.

Marine & Fire Ins. Co. v. The Vessel Gladiolus, 762 F.2d 1364 (9th Cir. 1985) (Kennedy, J.). *Accord: De Laval Turbine*, 502 F.2d at 264; *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478-79 (2d Cir.), *cert. denied*, 404 U.S. 855 (1971).

Therefore,

> [w]hen a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause.

Taisho Marine, 762 F.2d at 1367, citing *Rupp v. Int'l Terminal Operating Co.*, 479 F.2d 674, 677-78 (2d Cir. 1973), and *Cabot*, 441 F.2d at 478-79.[7] Each of the foregoing courts — from the oft-quoted Second Circuit's opinions in *Cabot* and *Rupp* to then-Judge Kennedy's opinion in *Taisho Marine* — has followed the same interpretive principles as applied by the Eleventh Circuit in this case.

Although Petitioner appears to accept those principles, it never applies them to the present facts. If it did, it would be unable to demonstrate how an inland carrier without privity could possibly be within the "well defined class of beneficiaries" contemplated in the generic language of "any agent, servant or other person including independent contractor." Petitioner's reliance on such broad contractual

7. Other federal appellate courts have relied on these two Second Circuit cases, *Rupp* and *Cabot*, for the proposition that any intent to extend liability to third persons must be clearly expressed. *E.g.*, *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 59 (4th Cir. 1979); *De Laval Turbine*, 502 F.2d at 264, 267.

language ignores the reality that maritime contracts have evolved in the wake of *Herd* and subsequent judicial decisions. Reassessing the risks of loss and the potential for bringing subrogation actions, carriers have refined the terms of Himalaya clauses, where appropriate. Increasingly, some market actors' response to consistently applied strict construction principles has been to specify which third parties will be included in Himalaya clauses.

For example, two decades ago, the Himalaya Clause Subcommittee of the United States Maritime Law Association's Committee on Stevedoring and Terminal Operations suggested that in an effective Himalaya clause, "Stevedore, terminal operators and other third parties should be specifically mentioned in the Himalaya Clause in order to ensure that the protection of COGSA will be extended to them." MLA document no. 652, pp. 7895, 7902 n.3 (April 1984). The MLA report explained: "Although a few early cases held that COGSA's limitations could be extended to stevedores by language in Himalaya clauses referring only to 'independent contractors' . . . the modern trend is moving toward a requirement of greater specificity." *Id.* at 7903. The report concluded that "the best guarantee of this result [*i.e.*, protecting stevedores and terminal operators] is the mention of stevedores and terminal operators by name in the Himalaya clause." *Id.* at 7904.

Similarly, *The Merchants Guide*, which is widely available in the shipping industry, provides effective language to protect rail carriers, language that was not contained in the ICC-Kirby bill of lading. *The Merchants Guide* (Int'l Ed. 1995) (P&O Nedlloyd). Recommendations such as this demonstrate that the maritime bar and its clients have long known that it is essential, in light of the strict construction

principle, to include specific language in a bill of lading if there is a desire to have it apply to parties other than those customarily covered by Himalaya clauses (such as those that do not have their own liability regime, *e.g.*, stevedores and terminal operators). No one can justifiably *assume* that a Himalaya clause is intended to go beyond maritime parties to protect inland carriers. Any intent to achieve that result must be demonstrated by very clear language.[8]

B. Petitioner May Not Avail Itself of the Limit of Liability in a Contract to Which It Was Not a Party

In applying the strict construction principle, the Eleventh Circuit first correctly held that the Himalaya clause in the ICC-Kirby bill of lading did not extend to Petitioner because Petitioner was nether a party to the ICC-Kirby bill of lading nor an independent contractor of ICC. In fact, Petitioner was two contracts removed from that bill of lading; it was a sub-subcontractor of ICC. Under these circumstances, Petitioner is not entitled to any limitation of liability provided in the ICC-Kirby bill of lading. That position has been well established over the years in court of appeals precedent that

8. The MLA report also advises on what to do to protect sub-subcontractors under COGSA. Its model Himalaya clause includes the following phrase:

> It is further agreed that the expression "servant, agent or independent contractor" in this Bill of Lading shall include direct and indirect servants, agents and independent contractors of the Carrier, as well as their respective "servants, agents or independent contractors."

Id. at 7902, ¶4, 7904 n.4. Of course such language was lacking in the ICC-Kirby bill of lading.

has helped Underwriters attain the certainty they need to establish affordable, consistent premiums for cargo interests and carriers alike.

In *Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327 (2d Cir. 1993), for example, the court held that a Himalaya clause does not apply unless there is "contractual privity" between the parties. Otherwise, COGSA protections would be extended to "indefinite and unforeseeable defendants who may have only an attenuated connection to the 'carriage of goods by sea.'" *Id.* at 333.[9] The privity requirement reflects an established, sensible apportionment of risk. For years, insurers, when underwriting cargo in international trade, have taken into consideration their ability to recover from responsible third parties who are not in privity with a shipper.

The decision below confirms this ability. If this avenue of recovery were now closed, as Petitioner urges, the parties' settled expectations in entering into thousands of contracts currently in force would be upset. Moreover, insurers would have to reevaluate and re-price their policies covering such

9. *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998), as the Eleventh Circuit noted below, rejected a privity requirement as applied to the bill of lading there, presumably because the bill's terms expressly included persons who were not in privity with the carrier. Instead, the court focused on comparing the nature of the services performed by the party who seeks to invoke the Himalaya clause compared to the carrier's responsibility under the carriage contract. Pet. App. 13a. Because the court in *Akiyama* expressly quoted the language of *Taisho Marine* and other Ninth Circuit cases to the effect that the parties' "contractual relation" is one factor for the court to consider, 162 F.3d at 573, it cannot be said that *Akiyama* categorically disavows the importance of contractual privity.

cargo, with little to guide their decisions about potential recoveries. Petitioner offers no sound reason for upsetting this long-established commercial understanding.

The privity requirement also is embodied in the language of this Himalaya clause. Construing the phrase "agent, servant or . . . independent contractor" necessitates asking *whose* agent, servant or independent contractor. It cannot be that the quoted language refers to *everyone's* employee, agent or independent contractor no matter where found or how attenuated its relation to the carrier that issues the bill of lading. The terms "agent," "servant" and "independent contractor" must refer to a non-party's relationship to the issuing carrier — *i.e.*, the would-be beneficiary must be the *carrier's* "agent" or the *carrier's* "independent contractor." If that were not the intended result, the drafters of the bill of lading could have simply written "all persons who participate in the carriage of the goods in any way to their end destination." By instead choosing understood common law relational terms, the drafters of this bill of lading necessarily intended that someone claiming the benefit of the Himalaya clause must be in a contractual relationship with the issuing carrier.

C. Petitioner May Not Avail Itself of a Limit of Liability in a Contract That Does Not Specifically Identify It as a Beneficiary

The second independent basis on which the Eleventh Circuit denied Petitioner coverage under the ICC Himalaya clause was that this clause did not adequately specify Petitioner as an "inland carrier" so that Petitioner could avail itself of any limitation of liability provided in that bill of lading. *See Taisho Marine*, 762 F.2d at 1367. This Court

should "not stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183 (1959).

Although Petitioner did not raise this issue in its petition for a writ of certiorari, and thus it is not properly before this Court, it was by itself an adequate basis to support the decision of the court below, and one that is supported by a wealth of decisions. *See, e.g., Herd*, 359 U.S. at 302-303; *Taisho Marine*, 762 F.2d at 1367. Thus, even if this Court were to agree with Petitioner's argument on the Himalaya clause issue as worded in its petition for a writ of certiorari, such a ruling would have no real consequence: the Eleventh Circuit's alternate holding based on the lack of specificity in failing to include a reference to "inland carriers" would still deny Petitioner relief. There is no reason for this Court to engage in the kind of advisory decision-making Petitioner seeks.

III. Petitioner Seeks An Unwarranted Windfall Through A Commercially Unreasonable Interpretation

The universe of non-maritime service providers involved in modern multimodal shipments, such as freight forwarders and inland carriers, is extensive. Unless the shipping contracts clearly identify the entities being protected, would-be free riders (such as Petitioner and others involved in inland carriage) could escape all but the minimal liability that Congress provided for ocean carriers in COGSA. *See Caterpillar Overseas*, 900 F.2d at 726.

If Petitioner were allowed to limit its liability to the shipper, based on language in a contract to which it is not a

party, its liability would amount to only a small fraction of the damage it caused — indeed so small an amount (less than one-third of one percent) that Petitioner might just as well be completely exonerated for its negligence. That such substantial windfalls may occur is illustrated here by the apparent fact that no entity other than Petitioner had anything to do with the train derailment. As the Second Circuit observed in *Mikinberg*, "any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its contractual privity with the carrier or shipper." 988 F.2d at 333.

Petitioner's position is commercially unreasonable. Petitioner is seeking the benefit of the limit of liability in the ICC-Kirby bill of lading after the fact. However, it could not have reasonably relied on that limit prior to its performance because Petitioner was unaware of the limit, or any other terms in that contract. After the derailment, Petitioner denied Kirby a recovery on the ground that Kirby was not a contracting party to Petitioner's Rail Circular. *See* Resp. Brief in Opposition to Certiorari at 19. Petitioner did not invoke the ICC Himalaya clause then, because it had no reasonable expectation that this provision had any application at all to limit Petitioner's liability.

Moreover, Petitioner's *own form contract* (which was used with the ocean carrier in this case) provides for a substantially higher limit of liability than does the ICC-Kirby bill of lading. Petitioner publishes on the Internet an Intermodal Rail Circular (the "Circular") that states, in the manner of a form contract, its terms of shipment. http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/system_information/general/intermodal_rules_circular.pdf. Under paragraph 8.3(e), Petitioner limits its liability for

intermodal container shipments to the lesser of the destination value of the goods or $250,000 per container. The current Circular was not in effect at the time of Kirby's shipment, but the $250,000 limit was. Thus, assuming a shipper inquired about what Petitioner agreed to pay in the event of loss — and the Circular itself requires anyone shipping cargo with Petitioner to make themselves aware of Petitioner's terms of carriage — it would have been reassured by Petitioner's own limits, which would have more than amply covered the total loss sustained by Kirby and its insurer. Petitioner also undertakes in paragraph 8.2 to pay its share of losses attributable to its negligence.

The Circular makes clear the understanding of the parties. First, Petitioner could not have been relying on the maritime $500 package limitation (set forth in COGSA), because its Circular makes it liable for up to $250,000 per container for its negligence. Indeed, in its immediate response to the derailment, Petitioner invoked only the Circular (including the $250,000 limit), which indicates that its subsequent invoking of the $500 package limitation was likely an invention of counsel. Second, nothing in the paragraph of the Circular that sets forth the liability limits (¶ 8.3(e)) ties those limits to a declaration of value for the goods. Thus, Petitioner's theory of reasonable reliance — that it "relied' on the absence of declared value for the goods by Kirby — is belied by the terms of its own Circular pursuant to which Petitioner carried the goods. Third, Petitioner has not revised its Circular during this litigation to alter its limitation amounts or otherwise tie its liability limits to those of ocean carriers. Presumably, if Petitioner's argument in this Court reflected corporate policy, Petitioner would have altered its Circular to clarify the circumstances in which it is liable in international multimodal shipments, in light of the decision

of the Eleventh Circuit, where Petitioner has its headquarters. Any argument, therefore, that Petitioner relied on different liability limits in setting its rates is fanciful.

The freight charges Petitioner collected for its transportation services should have compensated it for the risk of causing cargo damage during the course of its services. Of course, Petitioner could have (and may well have) purchased liability insurance to protect it in the event it caused damage to the cargo during the course of performing its transportation services, just as Kirby purchased insurance to protect it in the event of damage to its goods. Thus, a ruling in Petitioner's favor would give it a substantial windfall.

Allianz, on the other hand, receives no windfall at all from a ruling in Respondents' favor. Rather it would be deprived of an avenue of recovery which for good reason it *did* reasonably expect would exist when it entered into the insurance contract with Kirby covering this cargo. Allianz (and its predecessor in interest in this matter) would have insured the cargo on the expectation that a loss or damage at sea would be subject to the very low limits of COGSA. But because sea voyage losses are relatively rare (compared to rail and truck carriage), Allianz would have set its premium in the expectation that the most significant risk of loss would occur on the inland portion of the journey, where Petitioner's Circular would more than make up for a complete loss. It would also have set its premium in the expectation that it would be permitted to recover for that inland loss through a subrogation action.

As with many insurance issues, any reapportionment of established liability concepts will result in premium

adjustments. Marine cargo insurers determine premiums in part to reflect a historically based likelihood of recovery through subrogation from responsible third parties who are not identified as beneficiaries of limits of liability contained in contracts to which the shipper is a party. Cargo insurers employ personnel specialized in recovery who probe each case for possible grounds on which to recoup claims paid. Underwriters collect hundreds of millions of dollars in such recoveries each year. If they did not, insurance premiums would increase.

Shippers such as Kirby regularly choose to purchase cargo insurance rather than declare the full value of the cargo and pay a higher freight rate. This choice cannot be interpreted as a surrender of the shipper's rights to recover for loss or damage beyond the liability limit stated in the shipping contract. Shippers often conclude that, for them, seeking recovery through litigation for cargo loss or damage from carriers is too uncertain and lengthy a process.[10] Thus, shippers purchase their own cargo insurance in order to obtain predictable, prompt payment for their loss, and leave it to their insurer to pursue recovery against the appropriate party or parties through subrogation claims.

There is no void into which the Court needs to step to right matters and no unfairness it needs to correct. Regulatory bodies within government and the shipping industry regularly revisit issues of the appropriate limits of liability of which this case provides one example. The body of national and international laws on the subject of liability for cargo loss and damage is currently being addressed at the United

10. When this case is argued, it will have been seven years since Petitioner damaged Kirby's cargo, and it still has not paid anything in compensation for that damage.

Nations, where a new liability regime is being drafted. This work may produce a treaty that will be accepted by the United States and other nations.

For example, one issue in the drafting process is whether all carriers that participate in a multimodal shipment should be subject to the same liability regime. The American railroad and trucking industries have advised the State Department that they wish to be exempt from the proposed treaty. These industries apparently prefer to continue taking their chances on avoiding tort liability through individual contractual arrangements, rather than embrace a treaty which would impose on them minimum liability standards.

As this is occurring, Petitioner and its *amici* ask this Court, which has rarely addressed this topic, to jettison the standards calling for specificity and privity which are embodied in the decision of the court below and which have been relied upon by American exporters and importers and the insurers of their cargoes for at least 45 years. While the Congress and other entities with regulatory authority consider whether to change the law, however, there is no warrant for this Court to upset this precedent that has created settled, reasonable business expectations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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